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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

Nos. 430 and 834

SAM ACHILLI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 234 F. 2d 797. The opinion of the District Court, not yet reported, entered following the mandate of the Court of Appeals, appears in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals was entered June 5, 1956. (R. 1223.) Rehearing was denied July 31, 1956. (R. 1268.) The petition for certiorari in Docket 430 was filed September 17, 1956. On March 4, 1957, this Court vacated its prior order in Docket 430 of November 19,

1956, and granted the petition, limited to the question of whether petitioner could be prosecuted and sentenced as for a violation of Section 145(b) of the Internal Revenue Code of 1939, where the facts also showed a violation of Section 3616(a) of the Internal Revenue Code of 1939. (R. 1276.) On March 25, 1957, this Court granted the petition for certiorari in Docket 834, theretofore filed on March 13, 1957.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254(1).

STATUTES INVOLVED

Internal Revenue Code 1939, Title 26, U. S. C. (1939):

§ 145. Penalties—

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

§ 3616. Penalties—

Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;

* * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

QUESTIONS PRESENTED.

1. May a person be prosecuted and sentenced as for a violation of Section 145(b) of the Internal Revenue Code of 1939, where the facts also show a violation of Section 3616(a) of the Internal Revenue Code of 1939?

2. Does the overlap of Sections 145(b) and 3616(a) of the Internal Revenue Code pose an inconsistency so great as to preclude any valid sentence whatsoever?

STATEMENT OF THE CASE.

Petitioner was indicted on three counts charging that he "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America * * * by filing and causing to be filed * * * a false and fraudulent income tax return * * *" in violation of Section 145(b) of the Internal Revenue Code. (R. 3-5.)

Two trials were had, the first resulting in a mistrial ordered by the District Court on petitioner's motion. (R. 42.) The second trial resulted in a conviction on all three counts involving the calendar years 1946, 1947 and 1948. The petitioner was sentenced to two years imprisonment on each count, to run concurrently, and to pay a fine of $2,000 on each count, the fines to be cumulative, or a total of $6,000.

On June 5, 1956, the Court of Appeals for the Seventh Circuit reversed the judgment of conviction on the first count and affirmed judgment of conviction on the second and third counts. (R. 1223, 1236.) A petition for rehearing was filed and denied. (R. 1268-1272.)

This Court on November 19, 1956 denied certiorari, and

the matter came on before the District Court for sentencing under the mandate of the Court of Appeals.

On November 26, 1956, petitioner filed a motion to correct or reduce the sentence, relying partly upon the overlap of Sections 145(b) and 3616(a) of the 1939 Code. (R. 6)

On December 27, 1956, the District Court denied the motion to correct the sentence, but reduced the sentence to one year under counts 2 and 3 of the indictment, to run concurrently, and fined the petitioner $1,000 on each count, or a total of $2,000. While the District Court purported to deny the motion to correct the sentence on the ground of inconsistency between Sections 145(b) and 3616(a) of the Code, the Court stated, "I also feel that a sentence of this kind will ultimately do as much good as the former sentence under the felony counts would have done". (R. 10)[1]

Thereafter, petitioner moved in the Court of Appeals to enlarge the grounds for correction of sentence by raising the issue of the validity of any sentence in view of the conflict between Sections 145(b) and 3616(a) of the Code. (R. 24) The Court of Appeals denied the motion to enlarge. (R. 35) Nevertheless, that question is implicit in Question 1 as set forth in the Questions Presented.

1. This seemingly inconsistent action of the District Court, while reducing the sentence to a misdemeanor level, does not render the case moot. There is still left the implication that sentence was imposed under the felony counts. As this Court most recently stated on February 25, 1957, in *Thomas E. Pollard* v. *United States*, Docket 38, this Term, 25 L. W. 4174, "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." Here, as in the *Pollard* case, the "consequences collateral to the imposition of sentence" also justify dealing with the merits.

NOTE: Record references here are to record in No. 344

SUMMARY OF ARGUMENT.

Section 145(b) makes it a felony for a person to wilfully fail to truthfully account for or to attempt in any manner to evade or defeat the tax imposed. This identical conduct is also made a misdemeanor under Section 3616(a) of the 1939 Code. Admittedly, both sections cover income taxes and require the same proof. *Berra* v. *United States*, 351 U. S. 131. Petitioner asserts that Congress has failed to establish any criteria to resolve this inconsistency as to the penalties prescribed for the identical offense, and accordingly the statute is unconstitutional. Neither the court nor the prosecutor has the power to determine the measure of punishment in such cases, for only Congress has the power to declare criminal penalties.

The Government asserts that the court may fix the penalty under Section 145(b) simply if the proof supports the charge under that section. This certainly begs the question, for it is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment. That argument in effect asserts that the Government has the right to elect under which statute it will proceed in these tax cases. The power so asserted cannot be tolerated; it is at war with common concepts of equality under the law. Certainly the district attorney cannot decide who shall be charged with a felony and who shall be charged with a misdemeanor. Congress alone is vested with that responsibility. If, however, these two sections may coexist, then the section imposing the lesser penalty must control.

ARGUMENT.

I.

THE OVERLAP OF SECTIONS 145(b) AND 3616(a) PRECLUDES ANY VALID SENTENCE WHATSOEVER.

Both sections interdict the filing of a false return for the purpose of defeating or evading the tax imposed. Both sections cover income taxes.[2] This Court so assumed, *arguendo*, in *Berra* v. *United States*, 351 U. S. 131, 133. Cf. Government's brief in *Berra* case at page 24, n. 9.

Proof that petitioner filed a false income tax return under Section 145(b) would also prove a violation of Section 3616(a).[3] This Court expressly so held in *Berra* v. *United States*, 351 U. S. 131. There, the Court upheld the

2. The Government so conceded in its memorandum filed in response to the petition for certiorari in *Frank Costello*, No. 666, this Term. It is there stated:

> "The filing of a false and fraudulent return with intent to evade tax is also made a misdemeanor, punishable by imprisonment not exceeding one year and by fine not exceeding $1,000, by Section 3616(a) of the 1939 Code; and the latter section clearly applies to all federal tax returns, including income tax."

The Government now asserts in a memorandum filed in Docket 834 that Section 3616(a) does not apply to income taxes. For the purpose of the argument under this heading, it is assumed that Section 3616(a) applies to income taxes. See Section 61 of the 1939 Internal Revenue Code.

3. This is conceded in the memorandum filed by the Government in response to the petition for certiorari in the *Costello* case (No. 666), where it is stated at page 2:

> "In the instant case, as in *Berra* v. *United States*, 351 U. S. 131, and indeed, almost every case prosecuted under Section 145(b), the proof that the defendant wilfully attempted to evade taxes by filing a false return is identical with that required to prove that he filed a false return with intent to evade tax, in violation of Section 3616(a). In this respect Sections 145(b) and 3616(a) overlap."

denial of an instruction which would permit the jury to convict under either Section 145(b) or under the "lesser crime" provided for in Section 3616(a). This requested instruction was bottomed on Rule 31(c) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., providing that a defendant may be found guilty of an offense "necessarily included in the offense charged". In rejecting this contention, Mr. Justice Harlan, speaking for the majority, stated:

> "In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense. See *Stevenson v. United States*, 162 U.S. 313, 16 S. Ct. 839, 40 L. Ed. 980. But this is not such a case. For here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner 'willfully' attempted to evade taxes by filing a false return, §145(b), were identical with those required to prove that he delivered a false return with 'intent' to evade taxes, §3616 (a). In this instance §§145 (b) and 3616 (a) covered precisely the same ground."

While the Government admits that Sections 145(b) and 3616(a) overlap in a false income tax return case,[4] it is urged that the filing of a false return was not the only "manner" of attempted evasion, citing Costello's bookkeeping practices, failure to keep records, concealment of assets, etc. These, however, are but steps leading to the end result. And these practices by themselves are innocent unless they finally result in a "false return" as stated in Section 3616(a), or failure to "truthfully account" as provided in Section 145(b). If the full

4. N. 3, *supra*; page 2 of Government's memorandum re petition for certiorari in *Costello* case. The Government now urges in this case that Section 3616(a) does not apply to income taxes. That subject is discussed later in this brief.

tax is paid, the interest of the Government is set at rest. There can be no evasion of tax if the tax is paid in full.

In this case, as in *Costello*, petitioner was indicted for "filing a false return". The elements of proof which go to make up that offense must necessarily be the same as in the case of a "false return" under Section 3616(a). Common sense suggests that it is the "return" which is the crux of the case, and the "manner" in which a proper return is evaded is limited only by the evasive genius of each taxpayer. Proof in each case is identical in end result. It is therefore incongruous to assert, as the Government does,[6] that Section 145(b) "punishes wilful attempted evasion of income tax in any manner, without necessarily filing a false return". There can be no civil penalty for fraud without a deficiency in tax, and if there is no deficiency there can be no fraud—criminal or civil.

It is apparent that only one offense is involved where

5. The "attempt" at evasion which is adverted to in Section 145(b) does not have the common law significance of "attempt" as applied to ordinary criminal attempts. In the latter case the crime was intended or recklessly set in motion, but the end frustrated. Here, the connotation of the word "attempt" must mean an effort to "get by" with something; but the "attempt" is frustrated by the Revenue Service's diligence in examining the return. In this sense the "attempt" is the same as an "intent to evade" covered by Section 3616(a). As stated in *Prince* v. *United States* (1957), 352 U. S. ....., 77 S. Ct. 403, 407, "* * * the heart of the crime is the intent to steal. This mental element merges into the completed crime, if the robbery is consummated." Any "attempts" at evasion which culminate in a false return merge in the final act. Of course there may be "attempts" which are punishable as such under Section 145(b), such as false testimony before an internal revenue agent, or the use of deceptive devices in bookkeeping, hiding assets, etc., where no return is filed: *United States* v. *Kafes* (C. A. 3, 1954), 214 F. 2d 887, cert. den. 348 U. S. 887; *Smith* v. *United States* (C. A. 3, 1953), 206 F. 2d 905.

6. Memorandum re No. 834, page 4; also Government's memorandum re *Costello*, at page 3, n. 6.

the evidence which would suffice to prove one is the same as that which proves the other.[7]

The question than arises as to whether these sections pose an inconsistency so great as to preclude any valid sentence whatsoever. Certainly the prosecutor has no right of election.[8] This was pointed out by Mr. Justice Black, with whom Mr. Justice Douglas joined, dissenting in the *Berra* case, 351 U.S. 131, 139. And in *Rosenberg* v. *United States*, 346 U. S. 273, 306, Mr. Justice Frankfurter decisively limited the role of a prosecutor when he said,

> "* * * it cannot be left within the discretion of a prosecutor whether the judge may impose the death sentence wholly on his own authority or whether he may do so only upon recommendation of the jury. Nothing can rest on the prosecutor's caprice in placing on the indictment the label of the 1917 Act or of the 1946 Act. To seek demonstration of such an absurdity, in defiance of our whole conception of impersonality in the criminal law, would be an exercise of self-stultification. The indorsement of an indictment, the theory under which the prosecutor is operating, his belief or error as to the statute which supports an indictment or under which sentences may be imposed, are all wholly immaterial. *Williams* v. *United States*, 168 U.S. 382, 389, 18 S. Ct. 92, 94, 42 L. Ed. 509."

State courts have not hesitated to strike down criminal statutes which violate or by necessary implication may violate the rule of uniform application. In *State* v. *Fowler*

7. *United States* v. *Chiarella* (C. A. 2, 1950), 184 F. 2d 903. The "test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger* v. *United States*, 284 U. S. 299, 304. The rule has been announced in many cases. *Gavieres* v. *United States*, 220 U. S. 338; *Morgan* v. *Devine*, 237 U. S. 632; *United States* v. *Noveck*, 273 U. S. 202; *Albrecht* v. *United States*, 273 U. S. 1; *Pereira* v. *United States*, 347 U. S. 1.

8. This privilege was baldly asserted before the Court of Appeals in this case. 234 F. 2d 797, 809.

(1927), 193 N. C. 299, 136 S. E. 709, the court held invalid the provisions of a statute imposing harsher penalties for a second offender, where such penalties could not be applied in five counties in the state because of local option rules relating to intoxicating liquors. Thus the same offense would not be punished uniformly throughout the state.

This right of equal protection and equal enforcement of the law was also recognized in *Mitchell* v. *State* (1946), 157 Fla. 121, 25 So. 2d 73. There the court held that it was not competent "for the legislature to fix the time within which the prosecution may be commenced if the prosecution is commenced by indictment, and a different time if the prosecution be commenced by information. To hold otherwise would be tantamount to allowing the prosecuting officer to determine whether or not the statute of limitations should or should not be applicable." The court went on to say:

> "This right of equal protection may not be taken away by the State choosing to proceed with the prosecution by some method which will deprive him of the benefit of the statute of limitations while others guilty of the like offense may have the benefit of the statute of limitations because the State has chosen to proceed with the prosecution by a different method."

In *Ex Parte Garrett* (1934), 335 Mo. 1113, 75 S. W. 2d 577, the court held invalid a limitation on the City Court of St. Louis to impose sentences for misdemeanors of not more than six months, whereas the general state statute covering the same offenses provided for a greater punishment.

More recently the Supreme Courts of Oregon and Washington have had occasion to confirm this rule. *State* v. *Pirkey* (1955), 203 Ore. 697, 281 P. 2d 698; *State* v. *Cory* (1953), 204 Ore. 235, 282 P. 2d 1054; and *In Re Olsen* v. *Delmore* (1956), 48 Wash. 2d 545, 295 P. 2d 324.

In *State* v. *Pirkey*, the Supreme Court of Oregon declared unconstitutional a statute making it a crime to wilfully and fraudulently make, draw, utter or deliver an n.s.f. check, and authorizing the grand jury or the magistrate before whom a complaint is made to proceed, in their discretion, against violators either as for a misdemeanor or as for a felony. The Court there said:

> "The Fourteenth Amendment operates to forbid discrimination by the states against persons or classes in criminal cases. *Ughbanks* v. *Armstrong*, 208 U. S. 481, 28 S. Ct. 372, 52 L. Ed. 582. And it has been held that a statute which prescribes different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in like situation is violative of the Equal Protection Clause. * * *
>
> "The statute in question here defines and prohibits a specific act and provides punishment therefor, but there is no semblance of a classification which would enable one to ascertain under what circumstances he may be guilty of a felonious crime, or under what *circumstances* he may be guilty only of a misdemeanor. So far as the statute is concerned, the same identical act, under the same circumstances, may constitute a felonious crime when committed by one person, and a misdemeanor when committed by another. It might be said that this statute classifies punishments, but does not classify the circumstances to which the diverse punishments are to be applied. This is not legal classification. It is legal chaos."

The Court further observed that:

> "It would be monstrous to uphold and enforce a statute which authorized a grand jury or magistrate to determine finally whether an accused should receive a fine or a jail sentence, on the one hand, or a penitentiary sentence, on the other, and to make that decision before trial. * * * In our opinion, such a statute so construed would not only violate the Equal Protection Clause and constitute an unauthorized del-

> egation of discretionary power, but it would constitute an invalid encroachment upon the function of the courts whose prerogative and duty it is to determine, not only guilt, but punishment, upon judicial inquiry, after public trial and within the maximum and minimum limits prescribed by the legislature."

In *State* v. *Cory*, the Court held invalid the provisions of the Habitual Criminal Statute which authorized the prosecuting attorney in his discretion to file an information against the accused setting forth the previous convictions. This exercise of an absolute discretion vested in the district attorney in such circumstances was held unconstitutional.

In *Olsen* v. *Delmore*, the Court also held unconstitutional similar discretionary power in the prosecuting officials to charge violation of the Uniform Firearms Act either as a gross misdemeanor or as a felony.

This Court has expressly held that the equal protection clause does not prevent the states from recognizing "degrees of evil" in the classification of crimes. *Truax* v. *Raich* 239 U. S. 33, 43; *Moore* v. *Missouri*, 159 U. S. 673; *Finley* v. *California*, 222 U. S. 28; *Pennsylvania* v. *Ashe*, 302 U. S. 51. But, "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense * * * it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner* v. *Oklahoma*, 316 U. S. 535, 541.

This concept of equal protection in the sense of freedom from unjustifiable discrimination applies with equal force under the Fifth Amendment, *Bolling* v. *Sharpe*, 347 U. S. 497; *Chas. C. Steward Mach. Co.* v. *Davis*, 301 U. S. 548; *Communist Party of U. S. A.* v. *Moysey*, 141 F. Supp. 332.

Mr. Justice Black in his dissenting opinion in the *Berra* case made that eminently clear when he observed (351 U. S. 131, 140):

> "The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same."

The Inconsistent Penalties Create an Ambiguity Which Cannot Be Resolved.

There exists here an irreconcilable dilemma. Either Congress has unconstitutionally delegated its power to declare crimes to the prosecutor, as mentioned above, or these inconsistent penalties present an ambiguity which cannot be resolved by interpretation. In either case, the sections are void. Congress alone, of course, has the power to establish crimes and fix penalties,[9] but in exercising that power it must provide a reasonably definite standard so that people may measure their conduct accordingly.[10] As Mr. Justice Frankfurter, speaking for the Court in *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 229, so aptly stated, "We should not derive criminal outlawry from some ambiguous implication."

The court in *State* v. *Hall* (1931), 24 Ala. App. 336, 134 So. 898, assumed that where a statute failed to designate the crime as a felony or as a misdemeanor, it would be unconstitutional for the reason that the defendant is not apprised of the nature or character of the accusation

9. *Viereck* v. *United States*, 318 U. S. 236, 241; *United States* v. *Hall*, 98 U. S. 343; *United States* v. *Evans*, 333 U. S. 483.

10. Cf.: *Winters* v. *New York*, 333 U. S. 507; *United States* v. *Harriss*, 347 U. S. 612; *Pierce* v. *United States*, 314 U. S. 306; *United States* v. *Petrillo*, 332 U. S. 1.

against him, for he cannot know whether he is charged with a misdemeanor or a felony. The court there said, "If it should be held that the statute by its terms is both a felony and a misdemeanor * * * the statute must fall."

Again, in *Redding* v. *State* (1928), 109 Tex. Cr. R. 550, 6 S. W. 2d 361, the court held that a statute making it a felony or a misdemeanor to fraudulently take any chicken or turkey is void, stating:

> "Manifestly the act denounced cannot be both a felony and a misdemeanor. * * * The taking of a chicken, if an offense *eo nomine*, must everywhere in Texas be either a felony or it must everywhere be a misdemeanor."

In *Moran* v. *State* (1938), 135 Tex. Cr. 645, 122 S. W. 2d 318, the court on its own motion held that where the penalty for possession of distilled spirits on unlicensed premises was covered by two different statutes, each providing a different penalty, that the proper rule was not to assert the lesser punishment, but the entire statute was void.

We suggest that this conflict in the two sections of the Code goes beyond the scope of judicial interpretation and presents a situation such as this Court was confronted with in *United States* v. *Evans*, 333 U. S. 483. There, this Court refused to invade the legislative function, and, in effect, fix the penalty by a process of speculation as to the penalty Congress there intended. The Court stated (at p. 486):

> "The argument is therefore not merely that a rule of strict construction should be applied in petitioner's favor. It is rather that the choice the Government asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all."

Congress has utterly failed to supply any criteria in

Sections 145(b) and 3616(a) which would guide in the determination of what constitutes a felony and what constitutes a misdemeanor under these identical offenses. In the *Evans* case the Court found that uncertainty in the statute extended not only to the inconsistent penalties, but also to the statute's reach to bring in very different acts which conceivably might be held to be concealing or harboring of an alien not duly admitted. "This is a task," the Court observed, "outside the bounds of judicial interpretation. * * * We could do no more than make speculation law." (at p. 495)

The Government has informed the Court[11] that Section 3616(a) has been invoked, beginning in 1952, in the prosecution of numerous income tax cases where the Government was reluctant to bring felony charges because the offense was deemed to be of minor proportions. No such guide of course exists in the statute, and this is but another expression of the Government's position that it has authority to select under which section it will prosecute an alleged offender. This Court has flatly rejected such a solution to the dilemma.

A similar problem arose in *Holmes* v. *United States* (C. A. 5, 1920), 267 F. 529, 531, cert. den. 254 U. S. 640, and *Smith* v. *United States* (C. A. 10, 1944), 145 F. 2d 643, 644, cert. den. 323 U. S. 803. Both the *Smith* and *Holmes* decisions were concerned with Sections 35 and 36 of the Criminal Code. (Secs. 87, 88, Title 18 U. S. C. A.) A violation of one of these sections provided that the punishment should be that provided in the other section. However, the section to which reference was made contained alternative punishment, depending upon the seriousness of the offense. In holding these sections void for uncertainty, the Court in the *Smith* case said:

11. Memorandum re No. 834, page 2, n. 4.

> "A criminal statute must be definite and certain in respect to the punishment it is intended to impose. (Citing cases.) And a statute which, by reference to another, leaves the sentencing in doubt as to the punishment it may impose for the described offense, is void and inoperative."[12]

We are confronted with the same situation in the present case. The Court is left to conjecture as to which of the alternative punishments Congress intended for the identical offense. That would appear to be "a task outside the bounds of judicial interpretation".

II.

SECTION 3616(a) APPLIES TO INCOME TAXES.

In the Government's memorandum in response to the petition in No. 834, it is asserted for the first time that Section 3616(a) does not apply to income taxes. To support this position extensive historical research has been supplied. It was admitted in *Berra*, 351 U. S. 131, and in *Costello* (No. 666, this Term) as it was in the court below (234 F. (2) at 809) that Section 3616(a) would apply to income taxes, thus confessing error in *United States* v. *Dillon* (C. A. 8, 1955), 218 F. 2d 97 and *United States* v. *Moran* (C. A. 2, 1956), 236 F. 2d 361, cert. den. 352 U. S. 909.

This latest position of the Government purports to revitalize the corpse with a blood transfusion.

From this history it appears that Congress considered the misdemeanor statute,[13] originally enacted in 1798, to apply to income taxes imposed in 1861, inasmuch as the Revenue Act of 1861 contained no separate criminal statute

12. See also, *State* v. *Fair Lawn Service Center* (1956), 20 N. J. 468, 120 A. (2) 233.

13. Sec. 11, c. 70, 1 Stat. 580, 586.

relative to income taxes. In 1874, the criminal provisions of the 1864 Revenue Act became Section 3179 of Revised Statutes.[14] But there was no income tax law in effect then (Congress having repealed it in 1871), so that Section 3179 still carried its full general effect as to any "false list, return, account or statement" over into the Income Tax Act enacted in 1894, there being no separate criminal penalties.

In 1909, Congress for the first time enacted a separate penal provision applicable to income taxes, by providing maximum criminal penalties of one year in prison or a $1,000 fine, or both, for "willfully making a false or fraudulent return with intent to defeat or evade the assessment,"[15] the same penalties contained in Section 3179. In 1913 Congress imposed maximum criminal penalties of one year in prison or a fine not exceeding $2,000, or both.[16] This created for the first time a conflict as to the penalty provided in Section 3179 Revised Statutes.

The Revenue Act of 1917[17] removed this discrepancy by

14. Sec. 3179 derives from sec. 15, c. 173, 13 Stat. 227.

15. Sec. 38(8), c. 6, 36 Stat. 11, 117.

16. Sec. II F, 38 Stat. 114, 171, Tariff Act of 1913: "That if any person * * * liable to make the return or pay the tax aforesaid shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, such person shall be liable to a penalty of not less than $20.00 nor more than $1,000.00. Any person * * * required by law to make, render, sign or verify any return who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required by this section to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000.00 or be imprisoned not exceeding one year, or both, * * *."

17. 40 Stat. 300, 325, Sec. 1004: "That whoever fails to make any return required by this Act or regulations made under the authority thereof within the time prescribed or who makes any false or fraudulent return, and whoever evades or attempts to evade any tax imposed by this Act or fails to collect or truly to account for and pay over any such tax, shall be subject to a penalty of not more than $1,000.00, or to imprisonment for not more than one year, or both, at the discretion of the court, and in addition thereto a penalty of double the tax evaded, or not collected, or

again providing that a violation of the Act by the filing of a false or fraudulent return shall be punished by fine not exceeding $1,000, or imprisonment for not more than one year, or both. It is possible that Congress at this juncture recognized that the two statutes covered the same subject matter, and wanted to avoid any arguable conflict. At least, the net effect was to remove the inconsistency. And this seems entirely consonant with the past history of Section 3179 Revised Statutes, indicating that it applied to income taxes in those prior years when no penalties were provided in the income tax legislation. Thus, the two sections covered identical ground, at least through 1918.

On February 24, 1919 the Revenue Act of 1918 was approved. Section 253 of that Act retained the $1,000 fine or one year imprisonment provision for failure to file a return or to collect or to pay the tax, or supply information, but entirely changed the wording of the "false return" provision of the 1917 Act. The language of the 1918 Act, quoted below,[18] indicates that Congress was concerned with asserting the larger penalty for anyone who "willfully attempts in any manner to defeat or evade the tax". There was no language in this Act relating to the filing

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accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected, in any case in which the punishment is not otherwise specifically provided."

18. 40 Stat. 1057, 1085. "*Sec. 253.* That any individual, corporation, or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, shall be liable to a penalty of not more than $1,000. Any individual, corporation, or partnership, or any officer or employee of any corporation or member or employee of a partnership, who willfully refuses to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution."

of a "false and fraudulent return" or to failure to "truthfully account", as provided in the 1917 Act. It seems to us, therefore, that Congress was still retaining the misdemeanor provisions of Section 3179 Revised Statutes as to the filing of a "false and fraudulent" return with intent to evade, and making "attempts in any manner" punishable with a higher fine. This conclusion is supported by the provisions of Section 1305 of the 1918 Act, providing that "all administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act, and every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe."[19]

Also, Congress by Section 1317 of the Act, amended several other criminal and administrative sections of Revised Statutes (Sections 3164, 3165, 3167, 3172, 3173 and 3176), but retained without comment Section 3179. Congress at that time was not aware of the identity of these two offenses as urged in *Berra*. In fact, until this Court decided the *Berra* case, the Government was also of the opinion that Section 3616(a) (R. S. 3179) applied to income taxes. But the inevitable consequences of that position have led the Government now to urge that Congress was aware of this nicety of legal implication and acted in full recognition of it as far back as 1918.

But it would seem to us that if Congress saw any incongruity between Section 253 of the Revenue Act of 1918 and 3179 Revised Statutes, it would have met that situation by clarifying the subject in Section 1305 of the Act. All that Congress did by the 1918 Act was to make "attempts,"

19. Section 1305, 40 Stat. 1142.

as such, punishable by a higher fine. In other words, sharp bookkeeping practices, double sets of books, hiding transactions, etc., constituted in themselves a higher offense, regardless of the "false return" provisions of Section 3179. So construed, the two statutes complement each other. This Court in *Spies* v. *United States*, 317 U. S. 492, clearly characterized this distinction, indicating that in the case of "attempts," affirmative action is implied.

In later years, however, Congress combined the "attempts" provision of the 1918 Act with the failure to "truthfully account" for the tax as contained for the first time in the 1917 Act. Thus, Congress in the 1924 Act[20] took the language of the 1917 Act and made two sections out of it (Sections 1017(a) and (b)). The first subsection related to the wilful failure "to pay such tax, make such return, keep such records, or supply such information," which was made a misdemeanor. Section (b) made it a felony to wilfully fail to "collect or truthfully account for and pay over such tax", and to attempt "in any manner to evade or defeat any tax imposed by this Act".

It is important to observe that these criminal penalties were contained in Title X of the 1924 Act under the heading, "General Administrative Provisions," and applied to all taxes imposed by that Act. There is thus presented for the first time a clear-cut impact between the provisions of Section 1017(b) of the Revenue Act of 1924, and Section 3179 Revised Statutes. In substance, this would mean that Section 3179 was repealed in its entirety by implication, as it would overlap Section 1017(b). However, that conclusion cannot be supported by anything which Congress did in 1924 or in the later Acts, including the retention of that section as Section 3616(a) of the 1939 Code.

In the 1924 Act (Section 1018) Congress again amended

20. 43 Stat. 253, 343-344, Sec. 1017 (a) and (b).

several sections of Revised Statutes relating to taxes (Sections 3164, 3165, 3167, 3172 and 3173), but left intact Section 3179. It would seem, therefore, that the inconsistency between Section 3179 R. S. and Section 1017(b) of the 1924 Act did not occur to Congress. Clearly, Section 3179 through 1924 applied to both income taxes and other taxes, and as just mentioned, Section 1017(b) of the 1924 Act applied to all taxes.

With the exception of the Revenue Act of 1932, which contained a separate penalty provision in the case of gift taxes (Section 525), none of the Revenue Acts from 1926 through 1938 contained any separate criminal penalty provisions in the case of taxes other than income taxes. A separate criminal penalty for excise taxes, originally contained in Section 614 of the Revenue Act of 1932 as first introduced in Congress, did not become law. Thus, the criminal penalty provisions contained in the Revenue Act of 1924 (Section 1017(a) and (b)), which were followed through in identical language in the succeeding Revenue Acts until codified in the 1939 Code, continued in full force and effect. Congress was simply duplicating these criminal provisions in Section 146 of the 1926 Revenue Act and Section 145 of the later Revenue Acts and in the 1939 Code. This would not affect the full impact of Section 3179 Revised Statutes, which applied to all taxes.

If, as the Government's research indicates,[21] the 1939 Code was intended only to codify existing law, then the codifiers must have felt that Section 3179 Revised Statutes, which became Section 3616(a) of the Code, related to all taxes, including income taxes. This conclusion stems from the following analysis of the 1939 Code:

Section 61 of the Code extends to the income tax revisions "all administrative, special, or stamp provisions of

21. Memorandum in response to petition for certiorari in No. 834, n. 20, at page 9.

law, including the law relating to the assessment of taxes, so far as applicable."[22] These administrative provisions appear as Chapters 34 to 48 of the 1939 Code, subtitles D, E and F.

Section 3600 of the Code clearly applies to all taxes, including income taxes, by the specific reference to "any internal revenue tax".

Section 3601 of the Code, and certainly Section 3601(c), applies with equal force to income taxes.

Section 3602, relating to search warrants, has been consistently applied to income tax proceedings. Sections 3603 and 3604 are of course applicable to income taxes.

Section 3611, by the provisions of Section 3611(b)(2), applies to income taxes.

Section 3612(a) has been used by the Internal Revenue Service over the years in income tax proceedings. The specific penalties provided in Section 3612(d) are covered in Sections 291 and 293 in the case of income taxes, where it is provided that these additions to the tax are "in lieu of" the provisions of Section 3612(d).

Section 3614, authorizing examination of books, papers and records, has been consistently applied by the Internal Revenue Service to income tax matters. This is also true of Section 3615.

The provisions of Section 3616(a), relating to "list, return, account, or statement" referred to in the preceding sections, seemingly applies income taxes as well as other taxes.

Section 3616(b), relating to neglect to obey summons, clearly applies to income taxes, and there appears to be no

22. This language appears in the 1916 Revenue Act, Section 22, Title I, 39 Stat. 776. See also, Section 1001, Title X, Revenue Act of 1917, 40 Stat. 325; Section 1305, Title XIII, Revenue Act of 1918, 40 Stat. 1142.

good reason for considering the previous subsection as applying to taxes other than income taxes.

Section 3617 relates to liability for tax on income from illegally produced petroleum, and provides a specific civil penalty.

Section 3630 applies to income taxes as well as other taxes.

Section 3631, relating to restrictions on unnecessary examinations or investigations, has been applied over the years to income tax proceedings by the Internal Revenue Service.

The authority to administer oaths under Section 3632 has been consistently applied over the years to income tax proceedings. Section 3633, providing jurisdiction in the district courts to enforce summons, has most certainly been applied in income tax proceedings.

Section 3634 specifically excludes income tax. Interestingly enough, no other section in Chapter 34 specifically excludes application to internal revenue tax proceedings. If such exclusion were intended, the codifiers of the 1939 Code would have found it equally easy to make such express provision.

All of the provisions contained in Sections 3640 through 3814 apply with equal force to income tax proceedings. In some cases these sections apply only to income taxes.

Absent the detailed historical analysis of the internal revenue laws, we suggest that no one would have had the temerity to argue that Section 3616(a) does not apply to income tax proceedings. That it has been so applied in prior years is admitted by the Government. The foregoing analysis of the Revenue Acts does not indicate that Congress intended to repeal Section 3179 Revised Statutes as applied to income taxes. Nothing in the Revenue Act of 1924 so indicates. Indeed, Section 3748(a) of the Code

preserves a distinction between a false income tax return and attempts to evade or defeat any tax.[23] And, in the case of the offense of wilfully aiding or assisting in, etc., the preparation or presentation under the internal revenue laws of a false or fraudulent return, Section 3748(c) carries a six year statute of limitations. Clearly, the six year statute of limitations would apply in the case of a person wilfully aiding or abetting in the filing of a false or fraudulent income tax return under Section 3616(a).

It occurs to us that the Government's research into the antecedents of Sections 3616(a) and 145(b) of the Code would have been persuasive considerations for the Congress in 1939 and as assistance to the codifiers of the 1939 Code. The Congress, however, did not give particular consideration to the work of the codifiers, and in fact some protests were raised in the House that "no one has read the bill," and that there had been no hearings. (84 Cong. Record 786, 787, 788). The analysis here submitted indicates that Congress intended both statutes to apply, not giving any consideration to their possible conflict first made evident by this Court's decision in *Berra*, 351 U. S. 131.

We are confronted with a situation here much the same as that presented to the Court in *United States v. Harriss*, 347 U. S. 612, where the Court was called upon to determine whether the Lobbying Act was too vague to support criminal penalties. Mr. Justice Jackson, dissenting, felt that the clearest feature of the "vagueness" argument was the fact that "the Government charged with its enforcement does not understand it, for some of its important assumptions are rejected by the Court's interpretation".

In these income tax fraud cases the Government has seesawed in their interpretation of the relevant sections with the proverbial "greatest of ease". Admittedly, they have

23. This was assumed in *United States v. Beacon Brass Co.*, 344 U. S. 43, 44.

not hesitated to apply Section 3616(a) to income taxes which involve "minor" infractions of the income tax law. They have admitted in this and in other cases that Section 3616 (a) applies to income taxes. Now, at the very threshold of this Court's consideration of the case, we are asked to go back to 1798, and by a process of mental gymnastics learn that possibly Congress did not intend Section 3616(a) to apply to income taxes. We do not believe that criminal responsibility rests upon such vague and tenuous analysis.

Time has not permitted us to research this subject beyond what is here presented. There may be other factors which will warrant consideration by the Court, especially with reference to the enactment of the 1954 Code. Such additional considerations will be presented in our reply brief.

Section 7201 of the 1954 Code makes it a felony for any person to wilfully attempt "in any manner to evade or defeat any tax imposed by this title". This is the identical language contained for the first time in the 1918 Revenue Act (fn. 18). Section 7202 of the 1954 Code makes it a felony for any person to wilfully fail "to collect or truthfully account" for any such tax. This language derives from the 1924 Revenue Act. Section 7207 of the 1954 Code provides that, "Any person who wilfully delivers or discloses to the Secretary, or his delegate, any list, return, account, statement or other document, known by him to be fraudulent or to be false in any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both." This section derives from Section 3616(a) of the 1939 Code, except that it no longer requires the element of "intent to defeat or evade". It was this language in Section 3616(a) which made it cover precisely the same ground as Section 145(b). The precise question presented in this case will therefore not arise under the 1954 Code. It indicates, also, that Congress

for the first time met this problem directly by the three sections of the 1954 Code just mentioned.

III.

IF SECTIONS 145(b) AND 3616(a) MAY CO-EXIST, THEN THE LESSER PENALTY MUST APPLY.

In Mr. Justice Black's dissent in the *Berra* case, this alternative disposition of the case was suggested:

> "Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of Section 145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly."

The opinion concludes with the statement, "I would reverse this case or at least remand for resentencing under the misdemeanor statute, Section 3616(a)."

The principle that courts will resolve vague criminal statutes favorably to the accused, or apply the less harsh punishment, has been expressed many times by this Court.

Mr. Justice Frankfurter, speaking for the Court in *United States v. Universal C.I.T. Credit Corp.*, 344 U. S. 218, 221-222, said:

> "But when choice has to be made between two readings on what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

The Court accordingly rejected the Government's position that separate violations of the Fair Labor Standards Act arose as to each employee with respect to wages, overtime and record keeping provisions. This Court held that the offense made punishable under the Act was a course of conduct constituting a violation of the Act, and not each single deviation as to each employee.

In *Bell* v. *United States*, 349 U. S. 81, the defendant was indicted for violation of the Mann Act, on two counts for the transportation of two women on the same trip and in the same vehicle. The district court rejected the argument that this constituted a single offense so as to preclude cumulative punishment under the two counts. This Court reversed, on the ground that Congress had not clearly expressed its will as to whether this conduct constituted a single unit of prosecution or whether the transportation of each woman constituted an offense. The Court said:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. * * * It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." (349 U. S. 81, 83-84.)

Mr. Justice Douglas, dissenting in *Rosenberg* v. *United States*, 346 U. S. 273, 312, observed:

> "But it is law too elemental for citation of authority that where two penal statutes may apply—one carrying death, the other imprisonment—the Court has no choice but to impose the less harsh sentence."

This principle was confirmed most recently in *Prince* v. *United States*, No. 132, this Term, decided February 25, 1957, 77 S. Ct. 403, 407. The Court there held that the crime of entering or attempting "to enter any bank with intent to commit * * * any felony or larceny" merged into the completed crime upon consummation of the robbery. This conclusion the Court found to be consistent with its "policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history."

CONCLUSION.

For the reasons herein set forth, petitioner respectfully submits that the sentence imposed upon the petitioner herein is illegal and void, and that the judgment of the Court of Appeals in No. 430, and the judgment of the District Court below in No. 834, should be reversed and set aside, with directions to release petitioner. In the alternative, petitioner respectfully submits that the sentence imposed upon him requires correction, in that only the penalty provisions of Section 3616(a) of the 1939 Code apply, and that the judgment of the Court of Appeals below and of the District Court below should be reversed and the cause remanded with directions to correct the sentence accordingly.

Respectfully submitted,

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March, 1957.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

UNITED STATES OF AMERICA,
vs.
SAM ACHILLI.
} No. 53 CR 154

MEMORANDUM.

This matter came on to be heard on motion to correct and on motion to reduce the sentence heretofore imposed herein.

The Court has had the benefit of argument of counsel on briefs, has studied the authorities to which the Court's attention has been invited, has reviewed the entire record in this matter and is fully advised in the premises.

The Court has weighed the arguments advanced in support of the motion to correct which is based on the theory that the indictment in effect charges not felonies but misdemeanors only. The point has never been finally adjudicated by the United States Supreme Court and there would appear to be a diversity of opinion concerning it.

It is the considered opinion of this Court that there is insufficient basis here to warrant granting a motion to correct, and motion to correct has accordingly been denied.

With respect to the motion for reduction of sentence, the Court has given very thorough attention to every conceiv-

able aspect of this matter, among others, the fact that there has been a reversal by the Court of Appeals for the Seventh Circuit with respect to the First Count which involved non-payment of a sizable tax sum, now eliminated from this case; and giving the defendant the benefit of every doubt, this Court's own belief that a sentence of the kind now imposed will ultimately serve the same good purpose as the former sentence herein.

Therefore, a sentence has been imposed for a period of one year under the Second Count of the indictment together with a fine of $1,000, and one year under the Third Count of the indictment together with a fine of $1,000, unless sooner released by due process of law, the sentence under the Third Count to run concurrently with that under the Second Count, and the fines to be cumulative, or in the total sum of $2,000.

It is hardly necessary to say that the Court has devoted a great deal of time and thought to this case over the last two years, and, with studied reflection on the long road we have traveled, it is my present conviction that this determination represents a sound and proper disposition of the case, and that the ends of justice have been met.

/s/ WIN G. KNOCH.

Date: January 2, 1957.